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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER, Plaintiff, v. HARRAH'S ENTERTAINMENT, Inc. and DOES 1 through 100, inclusive, Defendants.	Case No. 07 CV 2226 DMS (AJB) Judge: Hon. Dana M. Sabraw Magistrate: Hon. Anthony J. Battaglia **PLAINTIFF JAMES M. KINDER'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS; MEMORANDUM IN SUPPORT THEREOF** Date: January 7, 2008 Time: 10:30 a.m. Courtroom: 13

I. INTRODUCTION

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE THAT Plaintiff JAMES M. KINDER hereby opposes Defendant HARRAH'S ENTERTAINMENT, Inc.'s Motion to Dismiss, for the reasons set forth below.

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II. ARGUMENT

A. PLAINTIFF WAS NOT AND IS NOT SUBJECT TO A PRE-FILING ORDER IN SAN DIEGO SUPERIOR COURT IF HE IS REPRESENTED BY COUNSEL

Defendant incorrectly asserts that this action was commenced in violation of a pre-filing order that required Plaintiff to obtain leave of the Presiding Judge of the San Diego Superior Court prior to commencing a new civil action in said court. The pre-filing order to which Defendant refers does not apply in this case as Plaintiff commenced this action while represented by counsel, attorney Chad Austin.

Attached hereto and incorporated herein by reference is Exhibit A, a ruling from now federal District Judge Janis Sammartino, in which she found that Plaintiff's action in *Kinder v. Adecco*, San Diego Superior Court Case No. GIC882000, was not commenced in violation of the pre-filing order in that he was represented by attorney Chad Austin. This ruling correctly stated that California Code of Civil Procedure (CCP) § 391.7 only grants authority to a judge to enter an order barring a person found to be a vexatious litigant from commencing an action without leave of court while acting *In Propria Persona*. Because Plaintiff did not commence this action *In Propria Persona*, but rather through counsel, CCP § 391.7 does not apply. Moreover, Judge Sammartino correctly noted that "there is nothing to suggest that the pre-filing order against Mr. Kinder includes a prohibition against counsel filing suit on his behalf."

Plaintiff understands that Defendant attempts to rely on *In re Shieh*, 17 Cal.App.4^{th} 1154, 1166-1167 (1993), as did Adecco in the above-referenced case. However, *In re Shieh* has nothing to do with the facts of this case and any allegation to the contrary by Defendant will be wholly unsupported by any facts.

Moreover, it appears to Plaintiff to be a total *non sequitur* for Defendant to claim that Plaintiff allegedly not "satisfying the prefiling [sic] order requirements to which he is subject" somehow renders his complaint unable to "state a claim upon which relief may be granted." [Defendant's Motion to Dismiss, Page 1, Lines 13-14]. The simple fact is that, all of its smoke screens aside, Defendant has violated the law clearly and without defense.

B. DEFENDANT'S REPEATED TORTIOUS ACTIVITY WITHIN THE STATE OF CALIFORNIA OVER THE COURSE OF MORE THAN THREE YEARS SUBJECTS IT TO THE GENERAL AND SPECIFIC JURISDICTION OF THIS COURT

1. Authority on Jurisdiction.

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code Civ. Pro. (CCP) § 410.010. California's jurisdictional statute is co-extensive with federal due process requirements; therefore, jurisdictional inquiries under state law and federal due process standards collapse into one, and the Court considers only whether the exercise of jurisdiction over the defendant comports with due process. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002).

Depending on the defendant's contact with California, the Court may exercise either general or specific jurisdiction. A nonresident defendant may be may be subject to general jurisdiction only if its contacts in the forum state are "substantial…continuous and systematic." Perkins v. Benguet Mining Co., 342 U.S. 437, 445-446 (1952). If not subject to general jurisdiction in a state, a defendant may nonetheless be subject to specific jurisdiction in that state. The Court applies a three-part test when assessing specific jurisdiction:

> (1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.*, it must be reasonable.

Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987); Bancroft & Masters, Inc., 223 F.3d at 1086 (9th Cir. 2000). If the plaintiff satisfies the first two prongs of the above test, the burden shifts to the defendant to "present a compelling" case demonstrating that the exercise of jurisdiction would be unreasonable. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985).

2. Plaintiff Need Only Allege a Valid Jurisdiction Theory and Make Out a *Prima Facie* Case Regarding Jurisdiction to Defeat Defendant's Motion.

Defendant's Motion to Dismiss apparently tests Plaintiff's jurisdictional theory-that Defendant made prerecorded telemarketing calls to California resident(s).

a. The Court Does Not Review the Evidence to Determine the Validity of Plaintiff's Theory of Jurisdiction and Plaintiff's Theory, Based on Defendant's Unlawful Telemarketing to California Residents, is Valid.

In evaluating Plaintiff's jurisdictional theory, the Court need only determine whether the facts alleged, if true, are sufficient to establish jurisdiction. Credit Lyonnais Securities (USA), Inc. v. Alcantra 183 F.3d 151, 153 (2nd Cir. 1999). Plaintiff's theory of jurisdiction, as is clearly set forth in the Complaint, is that Defendant knowingly made prerecorded telemarketing calls to Plaintiff's local San Diego number assigned to a paging service.

1. Defendant is Liable Based on Its Unlawful, Prerecorded Telemarketing to a California Resident

It is unlawful for any person or entity to disseminate a prerecorded message to any number assigned to a paging service, without the called party's *express* permission. 47 U.S.C. § 227 (b) (1) (A) (iii). Under the TCPA, the party on whose behalf a solicitation is made bears ultimate responsibility for any violations. *See* Release Number 95-310 of the Federal Communications Commission, CC Docket No. 92-90, 10 FCC Rcd 12391 (1995), pars. 34-35. Calls placed by an agent are treated as if the telemarketer itself placed the call. *Id.* Based on this authority, Defendant is responsible for the legal violations of its prerecorded telemarketing calls to Plaintiff. Because Defendant reached out to many (but an as of yet unknown number) of California's residents, including Plaintiff, California has general and specific jurisdiction over Defendant.

b. Plaintiff Need Only Make a *Prima Facie* Showing of Facts to Defeat the Motion to Dismiss to the Extent That it Contests Plaintiff's Alleged Facts.

To the extent that the instant motion challenges Plaintiff's alleged facts, Plaintiff need only make a *prima facie* showing of facts establishing a basis for personal jurisdiction over defendant to defeat it. *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.* 328 F.3d 1122, 1129 (9th Cir. 2003). In deciding whether Plaintiff has made a *prima facie* case, the Court must accept uncontroverted allegations in the Complaint and resolve factual conflicts in the parties' declarations in Plaintiff's favor. WNS, Inc. v. Farron, 884 F.2d 200, 204 (5th Cir. 1989).

Of course, where the jurisdictional facts are "intertwined with the merits of the action," determination of the jurisdictional issue may determine the merits of the action. Data Discovery, Inc. v. Systems Technology Associates, Inc., 557 F.2d, 1285-1286, fn. 2 (9th Cir. 1977). In such a case, it is *preferable* that this determination be made at trial where a plaintiff may present his case in a coherent, orderly fashion, and without the risk of prejudicing his case on the merits. *Id.*

For the many reasons set forth in this Memorandum, Plaintiff makes a *prima facie* showing of facts establishing a basis for jurisdiction over Defendant. At the very least, there is a factual conflict as to Plaintiff's and Defendant's evidence, and this conflict is decided in Plaintiff's favor. Regardless, the jurisdictional facts are so intertwined with the merits that the Court should postpone determination of the jurisdictional issue until trial, *after Plaintiff has had the benefit of proper discovery*, where Plaintiff will prove that Defendant actively and knowingly disseminated unlawful prerecorded telemarketing messages to California residents, including Plaintiff.

3. Because Plaintiff's Claims Arise Out of Defendant's Unlawful Telemarketing Within the State of California, California Has Jurisdiction Over Defendant

Plaintiff's claims arise out of Defendant's forum-related unlawful telemarketing that Defendant purposefully directed towards Plaintiff in California, so this Court's exercise of personal jurisdiction over Defendant is reasonable and it comports with "fair play and substantial justice."

a. Defendant's Contacts Resulted From Its Own Actions That Created a "Substantial Connection" Between Defendant and California and Thereby Enabled California to Exercise Personal Jurisdiction Over Defendant

1. Acts Committed Outside California "Causing Effect" Within California Suffice to Establish "Purposeful Direction"

If a nonresident, acting outside the state, intentionally causes injuries within the state, then he must "reasonably anticipate" being haled into court in the forum state. *Calder v. Jones* (1984) 465 U.S. 783, 790, 104 S.Ct. 1482, 1487. **All that matters is that the nonresident's liability-producing acts have foreseeable consequences in the forum state.** *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 479-480, 105 S.Ct. 2174, 2186.

In *Calder v. Jones,* *supra,* the intentional and allegedly tortious actions of Florida residents who wrote and published a defamatory article in Florida for publication in a national magazine were expressly aimed at California, because the article targeted a California resident. Similarly, here, Plaintiff shows that Defendant's unlawful telemarketing call was directed at a San Diego resident (the dissemination of a prerecorded telemarketing call is an intentional act). As in the *Calder* case, where a writer was deemed to have directed his actions at California notwithstanding the fact that there was no showing that he actually distributed the magazine, Defendant is deemed to have personally directed his actions at California. Although Defendant alleges it had no involvement with the scheme to disseminate prerecorded telemarketing calls, Plaintiff has certainly made out a *prima facie* showing that Defendant is not forthright in this regard.

In *Schlussel v. Schlussel*, the court held that obscene phone calls from New York to

California subjected the caller to California's jurisdiction. *Schlussel v. Schlussel*, (1983) 141 Cal.App.3d 194, 198-199. Analogously to the Schlussel case, Defendant's out-of-state conduct (or in-state conduct, depending upon what is revealed in discovery), whether it's actually disseminating the prerecorded telemarketing calls or hiring a third party to do same, subjects Defendant to jurisdiction in California.

i. Even A Single Tortious Act May Create Jurisdiction

Even a single act may support limited personal jurisdiction over a nonresident. *McGee v. International Life Insurance Co.*, (1957) 355 U.S. 220, 78 S.Ct. 199. For example, a single unlawful prerecorded telemarketing call to a forum state resident may support the exercise of specific jurisdiction over the nonresident telemarketer. *See* Schwarzer, *et al. Cal. Prac. Guide: Federal Civil Procedure Before Trial* (The Rutter Group 2005), 3:208.90 *citing Internet Doorway, Inc. v. Parks* (SD MS 2001) 138 F.Supp.2d 773, 774 (email messages are always the result of active, purposeful communications, so a single tortious email message to a forum state resident may support the exercise of specific jurisdiction).

In this case, however, it was not one tortious act. Rather, Defendant made a minimum of 7 unlawful, prerecorded telemarketing calls to Plaintiff's number assigned to a paging service. *See* Dec. of Chad Austin, ¶ 3.

ii. Out-of-State Electronic Transmissions May Be a Basis for Jurisdiction

Personal jurisdiction may be based on electronic transmissions intentionally directed to residents of the forum state and causing harm in the forum state. *See Cody v. Ward*, (D Ct 1997)

954 F.Supp. 43, 47 (fraudulent representations via email and telephone to forum resident). The electronic transmission of solicitations is commonplace and the courts are recognizing that such solicitations subject the sender to jurisdiction in the forum where injury results from the receipt of those missives. Internet Doorway, Inc. v. Parks, (S.D. Miss. 2001) 138 F.Supp.2d 773, 779; Verizon Online Services, Inc. v. Ralsky, (ED VA 2002) 203 F.Supp.2d 601, 610 (nonresident's sending millions of unsolicited email advertisements through plaintiff's Internet server in forum state constituted trespass to chattels, subjecting sender to local jurisdiction). "By sending an email solicitation to the far reaches of the earth for pecuniary gain, one does so at his own peril, and cannot then claim that it is not reasonably foreseeable that he will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation." Internet Doorway, Inc. v. Parks, (S.D. Miss. 2001) 138 F.Supp.2d 773, 779.

An advertiser should not be permitted to take advantage of modern technology via electronic means to engage in a tortious act with consequences in California and which harms a citizen in California, and escape traditional notions of jurisdiction because he used electronic means to carry out a long-distance tort. *See* EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., (D.Ariz.1996) 947 F.Supp. 413.

Of course, the dissemination of an unlawful prerecorded telemarketing call from outside the forum is analogous to the sending of an email, or any other electronic transmission, from outside the forum, and the sending creates jurisdiction.

iii. Courts Will More Likely Find Minimum Contacts Based on a Commercial Transaction

Defendant's telemarketing was done for commercial gain, which further militates in favor of finding that minimum contacts are satisfied. *Reliance Nat'l Indem. Co. v. Pinnacle Cas. Assurance Corp.*, (M.D. Ala. 2001) 160 F.Supp.2d 1327, 1333 (holding that "E-mails, like letters and phone calls, can constitute minimum contacts, at least if the defendant or his agents send the message for pecuniary gain rather than substantially personal purposes.").

2. Defendant Need Not Have Even Directed Its Own Activities at California to Create Jurisdiction

i. The Acts of Defendant's Third Party Telemarketer Suffice to Create Jurisdiction Even Without Defendant's Specific Direction

A nonresident defendant may be subject to specific jurisdiction in California based on local acts by an authorized agent. *Mitrano v. Hawes*, (4th Cir. 2004) 377 F.3d 402, 407.

Defendant is liable for the damages caused by the unlawful telemarketing even if it did not personally send them, if its authorized agent sent them. In other words, Plaintiff need only show that Defendant hired a telemarketing firm who had his authority to send the unlawful messages that were sent to Plaintiff. Plaintiff has clearly established that either Harrah's Entertainment or a telemarketing firm acting on its behalf sent prerecorded telemarketing messages to Plaintiff's number assigned to a paging service. *See* Dec. of Chad Austin, ¶¶ 4-5 and Exhibits C and D. [It is undisputed that Plaintiff received a prerecorded telemarketing call from "Harrah's" regarding Harrah's Rincon Casino in Valley Center, San Diego County, California and it is undisputed that Plaintiff received a prerecorded telemarketing call from

"Scott with **Harrah's Entertainment**."]

Notably, and perhaps dispositively, Defendant does not claim that it did not hire an independent third party telemarketer to engage in telemarketing in the State of California. It merely claims that neither it nor its employees did so. However, as noted above, the party on whose behalf unlawful telemarketing is done ultimately bears responsibility for damages flowing from the unlawful telemarketing.

ii. Defendant is Subject to Jurisdiction in California Simply Because It Placed Its Unlawful Prerecorded Telemarketing Call in the Stream of Commerce.

The requisite "substantial connection" for personal jurisdiction purposes will also usually be found where a nonresident manufacturer sells goods or services in the forum state, even if it doesn't have an office, plant or personnel locally, as long as it has "placed products in the stream of interstate commerce with the expectation that they will be sold to consumers in the forum state." *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297-298, 100 S.Ct. 559, 567; *see also* Schwarzer, *et al.*, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* (TRG 2005), 3:156-3:157. (a nonresident engaging in commercial activities in the forum state may be subject to jurisdiction if it purposefully availed itself of the benefits and protections of state law, for example by sales solicitation). "It is only reasonable for companies that distribute . . . products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states." *Barone Brothers v. Interstate Display Fireworks* (8th Cir. 1994) 25 F.3d 610, 614.

Indeed, if an adequate basis for jurisdiction exists, a non-resident may be haled into court anywhere in the United States, because courts generally conclude that it would be unfair to allow him to remain subject to personal jurisdiction only in his home state, requiring those with claims against him to go to that state in order to litigate such claims. *See CoolSavings.com, Inc. v. IQ Commerce Corp.* (ND IL 1999) 53 F.Supp.2d 1000, 1003 (nonresident website owner may be haled into court anywhere in the United States).

Because Defendant placed its unlawful prerecorded telemarketing call in the stream of commerce by calling a San Diego, California telephone number, it has subjected itself to suit in California for any matters relating to the dissemination of its unlawful telemarketing message.

iii. Even Mere Advertising Suffices to Create Specific Jurisdiction if the Action Stems from the Advertising.

Indeed, no more than advertising calculated to reach California is required to constitute purposeful availment of the privileges of doing business in California. *See United States SEC v. Carrillo*, 115 F.3d 1540, 1545 (11th Cir. 1997).

b. This Litigation Arises From Defendant's Contacts

Plaintiff meets this prerequisite for the establishment of personal jurisdiction.

c. Defendant Fails to Meet Its Burden of Showing That California's Exercise of Personal Jurisdiction Over Defendant Is Unreasonable

The burden is on the nonresident to prove that the forum's exercise of jurisdiction would not comport with "fair play and substantial justice." *Amoco Egypt Oil Co. v. Leonis Navigation Co.* (9th Cir. 1993) 1 F.3d 848, 851.

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1. The Extent of Defendant's Purposeful Interjection.

"Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King, 471 U.S. at 477. As set forth above, Defendant, either directly or through an agent, purposefully directed prerecorded telemarketing into California. Defendant's purposeful interjection is particularly offensive, because it electronically trespassed onto Plaintiff's private property. Senator Hollings called automated calls "telephone terrorism." 137 Cong.Rec. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("It is telephone terrorism, and it has got to stop.") Defendant's unilateral interjection into California is a form of electronic trespass on California property and should be addressed in a California court.

This factor weighs in favor of jurisdiction.

2. The Burden on Defendant in Defending in the Forum

In the context of the "fair play" analysis, the U.S. Supreme Court has noted that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). Progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958).

Further, Defendant must demonstrate that litigating this dispute in California would be so "gravely difficult and inconvenient" that he would be at a severe disadvantage in comparison to" Plaintiff. *Burger King* 471 U.S. at 477. Defendant has not even attempted to do so.

Defendant does not argue that California litigation would be more inconvenient than litigation elsewhere. Defendant does not suggest that the burden on it would be substantially different for it in California as opposed to Nevada or Delaware. In the absence of an expected trial of some length, there seems to be little difference whether Defendant retains counsel in California or in Nevada or Delaware to appear on its behalf. Regardless, Defendant can not be heard to complain of inconvenience when it was Defendant that made the decision to send unlawful advertising into California rather than limit same to its home state of Nevada.

Further, Plaintiff expects to prove that Defendant and other sundry Harrah's entities soon to be named as defendants made a lot of money from their illegal activities and that the cost of defending this lawsuit is a relatively small percentage of that profit.

This factor weighs in favor of jurisdiction.

3. The Extent of Conflict With the Sovereignty of the Defendant's State.

One aspect of "fair play and substantial justice" is the possible unfairness of a nonresident to the state's law. However, in this case, Plaintiff has brought one cause of action, for violation of the federal Telephone Consumer Protection Act. As this federal law applies everywhere in the

United States, this factor is irrelevant.

This factor weighs in favor of jurisdiction.

4. The Forum State's Interest in Adjudicating the Dispute

A state generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. *Burger King*, 471 U.S. at 473.

When the T.C.P.A.'s prohibitions are violated, the injury is visited upon the recipient of the call in California, and California has an interest in protecting its citizens from such harms in an efficient and meaningful manner. The effectiveness of the T.C.P.A., in particular, would be severely undercut if defendants could control the choice of forum to the detriment of their victims. Virtually no T.C.P.A. cases would be prosecuted if the defendants were not liable where they caused their damage. Creative defendants could safely avoid responsibility by secreting their operations far away from the locations to which they are bombarding persons with illegal faxes and phone calls. California has a strong interest in protecting its citizens from such machinations.

Therefore, both the state's and Plaintiff's interest in this forum is substantial, and the "interstate judicial system's interest" in enforcing the uniform federal law is furthered by finding proper jurisdiction over a T.C.P.A. cause of action where the call to the consumer was received.

Defendant does not even argue that California has no interest in protecting its citizens from its unlawful conduct.

This factor weighs in favor of jurisdiction.

5. The Most Efficient Judicial Resolution of the Controversy

The most efficient judicial resolution of this controversy would be for California courts to try this matter rather than having the parties go through the routine of re-filing in Delaware.

6. The Importance of the Forum to Plaintiff's Interest in Convenient and Effective Relief.

For the same reasons that the forum has an interest in adjudicating the dispute, it has an interest in providing convenient and effective relief.

For all of the above reasons, the exercise of personal jurisdiction would be fair and reasonable under the circumstances of this case.

d. Fewer Minimum Contacts Are Required When Reasonableness Dictates

Personal jurisdiction may be established with a lesser showing of minimum contacts if considerations of reasonableness dictate. *Ochoa v. J.B. Martin & Sons Farms, Inc.*, (9th Cir. 2002) 287 F.3d 1182, 1188, fn. 2.

Defendant has demonstrated that six of the seven factors courts consider in determining "reasonableness" weigh in favor of California's exercise of jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). So, although Defendant's purposeful aiming of its unlawful telemarketing call to a San Diego telephone number suffices for the exercise of jurisdiction, even an attenuated showing of "purposeful availment" would suffice given the reasonableness of California exercising jurisdiction.

4. If Plaintiff Has Failed To Make a Showing of Personal Jurisdiction, The Court May Postpone Its Ruling on the Instant Motion to Allow Him to Conduct Jurisdictional Discovery

If Plaintiff's evidence does not suffice to convince the Court that the instant Motion should be denied, Plaintiff requests permission to conduct limited discovery of jurisdictional facts. Where the motion to dismiss is made at the outset of the case, the court may continue the hearing in order to permit such discovery. *See* *Orchid Biosciences, Inc. v. St. Louis University* (SD CA 2001) 198 F.R.D. 670, 672-673.

Plaintiff is entitled to this discovery by making a "*prima facie* showing of personal jurisdiction." *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000). In this case, if the Court is inclined to deny the Motion to Dismiss, Plaintiff requests that the Court order a reasonable period of time for jurisdictional discovery to be conducted. Alternatively, Plaintiff requests leave to amend his Complaint.

III. CONCLUSION

Plaintiff has more than amply made out a *prima facie* case that Defendant was involved with the illegal telemarketing scheme. Specifically, Plaintiff has offered uncontroverted evidence that he received a prerecorded telemarketing call promoting a Harrah's casino to his California number assigned to a paging service and the man on the prerecorded message said that he was "Scott with **Harrah's Entertainment.**" *See* Dec. of Chad Austin, ¶ 5 and Exhibit C. Moreover, Plaintiff has provided uncontroverted evidence that he received a prerecorded telemarketing call **promoting Harrah's Rincon Casino** to his California number assigned to a paging service. He has also offered evidence, **including a document submitted by Defendant to the Rhode Island General Assembly**, that Harrah's Entertainment is, or at the very least may be, the operator of Harrah's Rincon Casino. *See* Dec. of Chad Austin, ¶ ¶ 4, 6, 7, 8, 9 and Exhibits B, D, E, F. Further, the website for Harrah's Rincon Casino specifically says, "Harrah's Entertainment ®." *See* Dec. of Chad Austin, ¶ 9. Finally, Defendant has offered no evidence that it has not hired a third party telemarketer to engage in telemarketing in the State of California. Given that Plaintiff has as of yet been denied any right to discovery, his *prima facie* showing more than amply demonstrates facts sufficient to call Defendant into California to answer for its unlawful conduct.

Defendant cannot complain that it has been sued in California--Defendant targeted its illegal telemarketing scheme at California, caused actionable harms to California residents, and is responsible for its own actions. Defendant's Motion must therefore be denied. Alternatively, Plaintiff respectfully requests the opportunity to conduct discovery and/or leave to amend his Complaint.

DATED: December 21, 2007

By: /s/ Chad Austin

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